FILE COPY

FEB 11 1931
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 239.

ALVIS MAYNARD, Administrator of Mary A. Ronan, Deceased, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, *Respondent.*

No. 240.

JOHN B. VARNEY, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, *Respondent.*

No. 241.

J. M. SMITH and A. B. SCOTT, *Petitioners,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, *Respondent.*

No. 242.

A. G. RUTHERFORD, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney, *Respondent.*

BRIEF FOR RESPONDENT ON REVIEW OF ABOVE CASES ON CERTIORARI.

STANLEY REED,
Counsel for Respondents.

BROWNING & REED,
Ashland, Kentucky,
STRATTON & STEPHENSON,
Pikeville, Kentucky,
Of Counsel.

SUBJECT INDEX.

PAGE

Summary of Argument and Applicable Statutes..... 2

Argument:

1. Provability of Claims Arising Upon Bankrupts' Endorsement of Unmatured Negotiable Instruments Not Containing Waivers of Protest, Notice or Diligence..... 9
   - (A) Such a Liability Is Contingent..... 10
   - (B) Contingent Claims Are Not Provable.... 11
   - (C) Provable Claims Specified in Act Do Not Include Endorsements of Unmatured Paper. Sections 63a (1) and (4) of the Bankruptcy Act Are to Be Read Together 12
   - (D) Discussion of Petitioner's Authorities... 21
2. Provability of Claims Based on Bankrupt's Endorsement of Negotiable Instruments Maturing More Than One Year After Adjudication 24
   - (a) Such Claims Not Provable..... 24
3. Laches 25
   - (A) General 25
   - (B) Laches Regardless of Bankruptcy Act 28
   - (C) Laches Under Bankruptcy Act..... 32
4. Effect of Former Petition to Re-examine..... 34
   - (a) There Is No Res Judicata Because This Is a Different Cause of Action..... 36

TABLE OF CASES

Adams vs. Adams, 25 Minn. 72.....9, 37
Adams, In re, 130 Fed. 381.....5, 13, 17
Adair Realty & Trust Co., In re, 35 Fed. (2d) 531...6, 21
Baltimore S.S. Co. vs. Phillips, 274 U. S. 316.....9, 37
Bibb Manufacturing Co. vs. Pope, 22 Fed. (2nd) 557 .....6, 21

PAGE

Burka, In re, 104 Fed. 326.....5, 13, 15
Caladonia Coal Co., In re, 254 Fed. 742.....9, 33
Canton Iron & Steel Co., In re, 197 Fed. 767.....9, 33
Cobb vs. Overman, 109 Fed. 65.....6, 23
Colman vs. Withoft, 195 Fed. 250.....6, 13, 21
Chase vs. Chase, 37 Atl. 804.....7, 26
Cromwell vs. County of Sac, 94 U. S. 351..... 9, 37
Dunbar vs. Dunbar, 190 U. S. 340,
3, 5, 6, 11, 12, 22, 24
Elliott vs. Maynard, 40 Fed. (2nd) 17..... 2
First National Bank vs. Elliott, 19 Fed. (2nd) 426 .....6, 18
Globe Laundry Co., In re, 198 Fed. 365.....9, 33
Huffman & Co., In re, 15 Fed. (2nd) 845.....9, 33
Hutchcraft, In re, 247 Fed. 187.....6, 15
Inman, In re, 171 Fed. 185.....6, 21
Independent Harvester Co. vs. Tinsman, 253 Fed. 935 .....9, 37
Jas. Dunlap Carpet Co., 163 Fed. 541.....7, 25
Jacobson vs. Miller, 41 Mich. 90.....9, 37
Jackson Co. vs. Gardiner Investment Co., 200 Fed. 113 .....8, 31
Jersey City vs. Central R. Co., 212 Fed. 76.....8, 31
Martin vs. Cole, 104 U. S. 30.....6, 24
Merrill Baker, In re, 186 Fed. 312.....6, 21
Moch vs. Market Street National Bank, 107 Fed. 897 .....6, 7, 21, 25
Munsie, In re, 32 Fed. (2nd) 304.....3, 11
Riggin vs. Magwire, 82 U. S. 549.....6, 23
Roth & Appel, In re, 181 Fed. 667.....6, 13, 17
Schechter, In re, 39 Fed. (2) 18.....7, 25
Schey vs. Turi, 294 Fed. 679.....8, 31
Semner Glass Co., In re, 135 Fed. 77.....6, 21
Smith, In re, 146 Fed. 923.....6, 25
Southern Pacific Co. vs. Bogart, 250 U. S. 483.....8, 31
Star Spring Bed Co., In re, 265 Fed. 133.....9, 33
Swift, In re, 112 Fed. 315.....5, 13
U. S. Mittis Co. vs. Detroit Steel Spring Co., 122 Fed. 863.....8, 31
Zavelo vs. Reeves, 227 U. S. 625.....5, 13

PAGE

STATUTES CITED.

Bankruptcy Act, Sec. 2-C-11..... 12
Bankruptcy Act, Sec. 57 (k).....8, 9, 32
Bankruptcy Act, Sec. 57 (l).....8, 32
Bankruptcy Act, Sec. 63 (a).....5, 12
Bankruptcy Act, Sec. 63 (b).....5, 12
General Orders of Bankruptcy No. 21, Sec. 6.....8, 9, 32
Bankruptcy Act of 1841, Sec. 5.....4, 11
Bankruptcy Act of 1867, Sec. 19.....4, 11
Negotiable Instruments Law, Sec. 81.....7, 30
Negotiable Instruments Law, Sec. 113.....7, 30
Negotiable Instruments Law, Sec. 66..... 3
Negotiable Instruments Law, Sec. 70..... 3
Negotiable Instruments Law, Sec. 89..... 3
Negotiable Instruments Law, Sec. 101..... 3

OTHER AUTHORITIES.

Loveland on Bankruptcy (3rd Ed.), Sec. 301.....6, 25
Loveland on Bankruptcy (3rd Ed.), Sec. 342
Minnesota Law Review, Vol. 12, page 60.....6, 21
Pomeroy on Equity (4th Ed.), Sec. 1440.....7, 26
Pomeroy on Equity (4th Ed.), Sec. 1441.....7, 26, 27
Pomeroy on Equity (4th Ed.), Sec. 1442.....7, 26
Pomeroy on Equity (4th Ed.), Sec. 1455.....8, 31
Remington on Bankruptcy (3rd Ed.), Sec. 777.....7, 25
Remington on Bankruptcy (3rd Ed.), Sec. 888 et seq. 7, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 239.

ALVIS MAYNARD, Administrator of Mary A. Ronan, Deceased, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, *Respondent.*

No. 240.

JOHN B. VARNEY, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, *Respondent.*

No. 241.

J. M. SMITH and A. B. SCOTT, *Petitioners,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane

No. 242.

A. G. RUTHERFORD, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney, *Respondent.*

BRIEF FOR RESPONDENT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The respondent respectfully presents this brief on review of the above cases on certiorari.

B.

The report of the opinion delivered in the Circuit Court of Appeals is found printed in Elliott vs. Maynard, 40 F. (2) 17. The District Court handed down no opinion. Its order in number 239 is found in Record page one; its order on number 240 is found in Record page six; its order on number 241 is found in Record page twelve, and its order on number 242 is found in Record page eighteen.

C.

The requirements of paragraph one of rule twelve have been fully complied with in the petition for certiorari.

D.

The statement of facts by petitioners, petition page two et seq., is accepted as accurate as to the facts shown by the record. We disagree with an obiter statement in the ninth category that First National Bank vs. Elliott was "without precedent or parallel."

SUMMARY OF ARGUMENT AND APPLICABLE STATUTES.

I.

Provability of Claims Arising Upon Bankrupts' Endorsement of Unmatured Negotiable Instruments Not Containing Waiver of Protest, Notice or Diligence (page 9).

A.

Such a Liability Is Contingent (page 10).

Dunbar vs. Dunbar, 190 U. S. 340.
In re Munsie, 32 Fed. (2d) 304.

Applicable provisions of Uniform Negotiable Instrument Law:

"66-Endorser without qualification; warrants. Every endorser who endorses without qualification warrants to all subsequent holders in due course: (1) The matters and things mentioned in subdivision one, two and three of the next preceding section; and (2) that the instrument is at the time of his endorsement valid and subsisting.

And, in addition he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent endorser who may be compelled to pay it."

"70—Presentment. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided presentment for payment is necessary in order to charge the drawer and endorsers."

"89—Notice of Dishonor. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each endorser, and any drawer or

endorser to whom such notice is not given is discharged."

"101—Notice to Bankrupt or Insolvent. When a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee."

B.

Contingent Claims Are Not Provable (page 11).

Act of 1841—Section 5:

"And all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, endorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt shall be permitted to come in and prove such debts or claims under this Act, and shall have a right, when their debts and claims become absolute, to have the same allowed them."

Act of 1867—Section 19:

"If the bankrupt shall be bound as drawer, endorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared."

C.

Provable Claims Specified in Act Do Not Include En-

dorsements of Unmatured Paper. Sections 63a (1) and (4) of the Bankruptcy Act Are To Be Read Together (page 12).

Bankruptcy Act, Section 63 (a) and (b):

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. (2) Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied, and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less cost incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

Dunbar vs. Dunbar, 190 U. S. 340;
Zavelo vs. Reeves, 227 U. S. 625;
In re Burka, 104 Fed. 326;
In re Swift, 112 Fed. 315-321;
In re Adams, 130 Fed. 381;

Colman vs. Withoft, 195 Fed. 250, 252;
In re Roth & Appel, 181 Fed. 667, 673;
In re Hutchcraft, 247 Fed. 187;
First National Bank vs. Elliott, 19 Fed. (2d) 426;
12 Minnesota Law Review, 60;
In re Adair Realty & Trust Co., 35 Fed. (2d) 531;
Bibb Manufacturing Co. vs. Pope, 22 Fed. (2d) 557;
Merrill vs. Baker, 186 Fed. 312;
In re Inman, 171 Fed. 185.

D.

Discussion of Petitioners' Authorities (page 21).

Moch vs. Market Street National Bank, 107 Fed. 897;
In re Semner Glass Co., 135 Fed. 77;
Colman vs. Withoft, 195 Fed 250;
Cobb vs. Overman, 109 Fed. 65;
Riggin vs. Magwire, 82 U. S. 549;
Martin vs. Cole, 104 U. S. 30;
Dunbar vs. Dunbar, 190 U. S. 340.

II.

Provability of Claims Based on Bankrupts' Endorsement of Negotiable Instruments Maturing More Than One Year After Adjudication (page 24).

Such Claims Not Provable (page 24).

Bankruptcy Act, Section 57-n:

"Claims shall not be proved against a bankrupt estate, subsequent to one year after the adjudication."

Loveland on Bankruptcy, Section 301;
In re Smith, 146 Fed. 923 at 926;

Moch vs. Market Street National Bank, 107 Fed. 897;
Remington on Bankruptcy, 3rd Edition, Section 777;
Jas. Dunlap Carpet Co., 163 Fed. 541;
In re Schechter, 39 Fed. (2d) 18.

III.

Laches.

A. General (page 25).

Delaying of Re-examination Petitions to July 25, 1927, Did Not Amount to Laches (page 25).

Pomeroy on Equity, 4th Edition, 1440, 1441, 1442, et seq.;
Chase vs. Chase, 37 Atl. 804.

B. Laches Regardless of Bankruptcy Act (page 28).

No Disadvantage Accrued to Petitioners Because Petitions Were Not Filed Earlier (page 28).

Remington on Bankruptcy, 3rd Edition, Sec. 888 et seq.
Uniform Negotiable Instrument Law:

"Section 81. When Delay in Making Presentment Is Excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

"Section 113. Delay in Giving Notice—How Excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances

beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence."

Litigation Was Pending Over The Identical Questions In Other Claims In The Same Estates (page 30).

Pomeroy on Equity, 4th Edition, Section 1455;
U. S. Mittis Co. vs. Detroit Steel Spring Co., 122 Fed. 863;
Schey vs. Turi, 294 Fed. 679;
Jersey City vs. Central R. Co., 212 Fed. 76;
Jackson Co. vs. Gardner Investment Co., 200 Fed. 113;
Southern Pacific Co. vs. Bogart, 250 U. S. 483.

C. Laches Under Bankruptcy Act (page 32).

Bankruptcy Act Specifically Permits Re-examination At Any Time Before Closing of Estate (page 32).

Bankruptcy Act, Section 57-k:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

"Section 57(1)—Whenever a claim shall have been reconsidered and rejected in whole or in part, upon which a dividend has been paid, the Trustee may recover from the creditor the amount of the dividend received upon the claim, if rejected in whole or the proportional part thereof, if rejected only in part."

General Order in Bankruptcy, No. 21, Section 6:

"When the trustee or any creditor shall desire

the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred, for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor, etc."

In re Star Spring Bed Co., 265 Fed. 133;
In re Globe Laundry Company, 198 Fed. 365;
In re Canton Iron & Steel Co., 197 Fed. 767;
In re Huffman Co., 15 Fed. (2) 845;
In re Caladonia Coal Co., 254 Fed. 742.

IV.

Effect of Former Petition to Re-examine (page 34).

There is no res judicata because this is a different cause of action (page 36).

General Orders in Bankruptcy, 21 Sec. 6 supra;
Bankruptcy Act, 57 k supra;
Baltimore S. S. Co. vs. Phillips, 274 U. S. 316;
Cromwell vs. County of Sac, 94 U. S. 351;
Adams vs. Adams, 25 Minn. 72;
Independent Harvester Co. vs. Tinsman, 253 Fed. 935;
Jacobson vs. Miller, 41 Mich. 90.

ARGUMENT.

I.

PROVABILITY OF CLAIMS ARISING UPON BANKRUPTS' ENDORSEMENT OF UNMATURED NEGOTIABLE INSTRUMENTS NOT CONTAINING WAIVERS OF PROTEST, NOTICE OR DILIGENCE.

As shown by the statement of the Cases and the Agreed Statements of Record on Appeal below, all of the claims were based on endorsements by one or both of the bankrupts of the simplest form of negotiable instruments, e.g.:

$2,400.00. Williamson, W. Va.

Three years after date I promise to pay to the order of W. P. T. Varney—Twenty-Four Hundred Dollars, Value received, Negotiable and payable at The Day and Night Bank, Williamson, W. Va., with 6% interest.

FERD H. VARNEY.

Endorsement on reverse, "Pricy A. Varney, Nancy Jane Varney." The endorsers were the bankrupts. None of the notes had matured at the date of the filing of the voluntary petition and adjudication in bankruptcy, both of which events took place August 3rd, 1925.

A.

Such a Liability Is Contingent.

The Uniform Negotiable Instrument Act was at the date of the making of all notes and now is in force in Kentucky and West Virginia. By the provisions of that Act the liability of an endorser arises only upon the event of certain contingencies. The applicable provisions of the Negotiable Instruments Act, uniform in Kentucky and West Virginia, are set out in the Brief of Argument, *supra*. By these provisions, an endorser without qualification undertakes to pay the same, "if it be dishonored, and the necessary proceedings on dishonor be duly taken." When the instrument, as these are, is payable at a special place, it must be so pre-

sented to charge the endorser. Notice of dishonor must be given each endorser and any endorser "to whom such notice is not given is discharged."

A contingent claim has been defined as follows:

> "A contingent claim is one as to which it remains uncertain at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it." In re Munsie, 32 F. (2) 304.

Such an endorsement as we are here considering has been specifically called a contingent liability by this court. Dunbar v. Dunbar, 190 U. S. 340 at 350.

B.

Contingent Claims Not Provable.

As the former Bankruptcy Acts specifically allowed proof of contingent claims, Act of 1841, Sec. 5; Act of 1867, Sec. 19; it is inconceivable that Congress in considering the present act did not give careful consideration to the question of the provability of contingent claims and did not deliberately omit them. In both former Acts, the word "endorsers" appears among the classes permitted to prove. Efforts to secure congressional committee reports which might throw light on the then attitude of Congress have been unavailing. The English Act of 1869, in force in 1898, makes contingent claims provable, Bankruptcy Act, Sec. 31, "Capable of being ascertained by fixed rules, or assessable only by a jury, or as a matter of opinion." It may, therefore, be safely concluded that contingent claims as such are not provable under the present Bankruptcy Act.

C.

Provable Claims Specified in Act Do Not Include Endorsements on Unmatured Paper.

The Bankruptcy Act provides as to just what debts are provable in Section 63, quoted in our Brief of Argument. "Debt" under the Bankruptcy Act is a provable claim, Bankruptcy Act, Sec. 2-c 11. For these claims to be provable, they must come under one of the categories stated in Section 63. It is settled that unliquidated debts, referred to in paragraph b of 63 do not enlarge the class of provable debts. Dunbar v. Dunbar, 190 U. S. 340:

> "This paragraph (b), however, adds nothing to the class of debts which might be proved under paragraph (a) of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of 63-a, to be liquidated as the court shall direct."

None of the other categories are applicable unless it is the fourth. It is under this that appellees contend their debt is provable. It reads:

> "Founded upon an open account, or upon a contract expressed or implied."

Taken alone this would permit the proof of such endorsements as we have here. It must be read, however, with its context. Section one provides for instruments in writing, such as these and states that they must be "absolutely owing at the time of the filing of the petition." It is probable that four was intended to cover unwritten contracts. At any rate, it has been held by the Supreme Court that all of 63 is to be read

together and that the provisions of one limit four, so that, in all cases, the obligation must be absolutely owing at the time of the petition to be provable. Zavelo v. Reeves, 227 U. S. 625. This case relates to the provability of a claim arising after bankruptcy. Held not provable.

> "For the definition of provable debts, we are referred to section 63, which is set forth in the margin. Of the several classes of liabilities, those in classes 1, 2 and 3 are in terms described as existing at or before the filing of the petition. Clause 5 relates to liabilities founded upon provable debts reduced to judgment after the filing of the petition, etc.; plainly meaning that they arose before its filing. Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express or implied,' not in terms referring to the time of the inception of the indebtedness. But reading the whole of Section 63, and considering it in connection with the spirit and purpose of the Act, we deem it plain that the debts based on open account or upon contract, express or implied, that are provable under Section 63-a, clause 4, include only such as existed at the time of the filing of the petition in bankruptcy."

The view above expressed as to clause 4 of Section 63 a is the same that has been generally adopted in the Federal District Courts. In re Burka, 104 Fed. 326; In re Swift, 112 Fed. 315-321; In re Adams, 130 Fed. 381; Colman v. Withoft, 195 Fed. 250, 252, and see In re Roth and Appel, 181 Fed. 667, 673. These cases hold one and four in pari materia.

In re Swift, 112 Fed. 315. Hutchinson v. Dee, Circuit Court of Appeals, First Circuit, December 6, 1901.

In this case the bankrupts were stockbrokers and

the creditor, Dee, was one of their customers. The claim which Dee made was for certain shares of stock which had been bought and held for Dee by the bankrupts, and for which the bankrupts were accountable to Dee less about 25 per cent of the value of such stocks which was the amount Dee still owed them on the stock. In December, 1899, the bankrupts made an assignment for the benefit of creditors, to which assignment Dee never became a party; in April, 1900, the bankrupts filed a petition in bankruptcy. The stocks had increased in value by the time of the petition and the question is whether Dee may make his claim on the value at the time of the assignment or at the time of the petition. The question at issue which is pertinent to our case was the contention that unless the assignment ripened the claim of Dee, it was not ripened in time to become provable.

The Court held:

> When a broker makes a general assignment, or is adjudged a bankrupt, a demand and tender are not necessary to enable the customer to assert a breach of the broker's contract; but, as an assignment may be only a temporary expedient to tide over the broker's difficulties, both parties may unite in regarding it as such, so that the customer may treat the subsequent bankruptcy as the breach, in the absence of any tender of performance by the trustee within a reasonable time, and, thereupon, the customer's damages will be determinable as of the date of the petition in bankruptcy.

In commenting further on provable debts, the court said:

> That part of the present Bankruptcy Act which describes what debts may be proved does not re-

peat at all points the words "owing at the time of the filing of the petition," but it is impossible to consider it other than as though it did thus repeat them.

In re Hutchcraft, 247 Fed. 187, District Court E. D. Kentucky, at Covington, October 10, 1917.

Bankrupt was a director in a bank which had been placed in the hands of the state banking commissioner for liquidation, who had brought two suits against bankrupt and other directors to charge them jointly and severally for misuse of funds of the bank. These suits were pending at the time of the proceedings in bankruptcy; the defendants denying liability. The commissioner filed a claim with the trustee covering the amounts which he was suing for.

Held—The Claims of the commissioner were not provable debts against the bankrupt's estate, either by the commissioner or by the bankrupt's co-directors, because they were not fixed liabilities absolutely owing, but were not only contingent, but the amount of liability, if any, could not be ascertained until final distribution of the assets of the bank.

In regard to provable debts the court cited the case of Colman Co. v. Withoft, 195 Fed. 250, that subdivisions 1 and 4 of Section 63 (a) of the Bankruptcy Act are in *pari materia* and that the words "absolutely owing at the time of the filing of the petition against him" are to be read into subdivision 4. The court also says that the fact that contingent debts are not provable under the Act of 1898 is an inference from the fact that provision was made in the Acts of 1841 and 1867 for contingent debts but such provision was excluded from the Act of 1898.

In re Burka, 104 Fed. 326, District Court E. D. Missouri E. D., October 24, 1900.

This case came before the Court on petition to review the finding of the referee in allowing a claim for legal services unconnected with the bankruptcy proceedings which services were contracted for by the bankrupt after the filing of the petition for adjudication against him, and prior to the actual adjudication.

The Court held that the rights of the creditors of a bankrupt in general relate to the date of the filing of the petition, and a debt not then in existence, although arising before the adjudication cannot be proved against his estate.

In commenting on what are provable debts, the court said:

> "It is observed that all of these classes of provable debts, except the fourth, relate, by express terms of the statute, to such as were in existence at the time of the filing of the petition. The fact that the fourth subdivision contains no words of limitation is considered by claimant's counsel a warrant for his contention that his claim, which is founded on an open account, is provable, notwithstanding the fact that it was not in existence when the petition was filed. It is not apparent why this subdivision is inserted without words of limitation as to the time the claim should have accrued. Especially is this so when there seems to have been a studied effort to insert such words in relation to all the other provable claims. But I cannot construe this omission into a general provision for allowance of demands against the estate of a bankrupt, irrespective of the time when they accrued. If such construction be given to the statute, there would be no limitation even to such claims as existed at the date of the adjudication. The general language would cover any claims that might accrue during the pending of the proceedings, even up to the final discharge. In the absence of express provision to the contrary, I think that

debts provable under the Act must be such as existed at the date of the filing of the petition."

The reasoning of Roth & Appel, 181 Fed. 667, is applicable:

> "But while it is not necessary, in order to reach a decision in this case, to determine whether 63-a (4) is subject to the limitation contained in 63-a (1)—that debts to be provable must be absolutely owing at the time of the filing of petition—we think it the better view that it is so limited. If it is not so limited, the limitations in the first subdivision are practically of no effect. All claims upon instruments in writing not provable under the first clause, because not absolutely owing at the time of the petition, might be proved as claims founded upon a 'contract express or implied' under the fourth clause, if no limitations are attached to the latter. We can not regard this interpretation as tenable. We think that the different clauses of 63-a should not be considered as independent, but should be read together, and that the said limitation in the first clause should be considered as repeated in the fourth clause. This interpretation of the section is supported by authority. Thus In re Swift, 112 Fed. 316, 50 C. C. A. 270, already referred to, the Circuit Court of Appeals for the First Circuit said:
>
> > 'That part of the present bankruptcy act which describes what debts may be proved does not repeat at all points the words "owing at the time of the filing of the petition," but it is impossible to consider it other than as though it did thus repeat them.'"

And In re Adams (D. C.) 130 Fed. 381, the court said:

> "But a creditor can not prove for an indebtedness arising between the filing of the involuntary

petition and adjudication. This appears from the analogy of Section 63-a, (1), (2), (3) and (5), as applied to the interpretation of clause (4). In clauses (1) and (4), for example, the limit of time must be the same, inasmuch as clause (4) includes clause (1), and if clause (4) were less limited in point of time, the limit imposed upon clause (1) would become nugatory.

"For these reasons, we think that the claim of the appellant whether regarded as one for unaccrued rent or for indemnity for loss of rent, was not provable against the bankrupt estate under either Section 63-a(1), or 63-a(4), and was properly expunged by the District Court."

The language of the Elliott case definitely states the position of the Sixth Circuit (First National Bank v. Elliott, 19 F. (2) 426):

"A much stronger line of authority than that following Moch v. Market Street National Bank restricts provable debts, whether coming under subdivision 1 or subdivision 4 of section 63a, to those which were ascertainable at the time of the filing of the petition. In Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084, the court, quoting, on page 349 (23 S. Ct. 761), section 63a, and holding that section 63b, providing for liquidation of unliquidated debts, adds nothing to the class of debts which are provable under Section 63a, says (page 350—23 S. Ct. 761): 'We do not think that by the use of the language in Section 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.'

"The Court proceeds, then, to note the significant fact that, respecting contingent liabilities, the present law is much more restricted in its provisions than the Bankruptcy Acts of 1841 and 1867 (5 Stat. 440; 14 Stat. 517), which provide expressly

for cases of contingent debts and liabilities contracted by the bankrupt. In Crawford v. Burke, 195 U. S.. 176, 25 S. Ct. 9, 49 L. Ed. 147, and in Grant Shoe Co. v. Laird, 212 U. S. 445, 29 S. Ct. 332, 53 L. Ed. 591, it is held that claims which are based upon a right of action present at the time of, or created by, the filing of the petition, are provable subject to liquidation under Section 63b.

"Finally, the exact question, although not directly involved, was considered by the Supreme Court in Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914 D, 664. Therein the court, after referring to the terms of Section 63a, said, at page 631 (33 S. Ct. 368): 'But, reading the whole of Section 63, and considering it in connection with the spirit and purpose of the Act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under Section 63a (4), include only such as existed at the time of the filing of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, in 1898, under the authority conferred by Section 30 (Comp. St. Section 9614), a form of discharge was prescribed (Forms in Bankruptcy, No. 59), by which it is ordered that the bankrupt 'be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the ..... day of ....., A. D. ....., on which day the petition for adjudication was filed ..... him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.' "

The opinion proceeds by citing with approval a series of cases to this effect decided by the lower federal courts, including Colman Co. v. Withoft (C. C. A.), 195 F. 250, 252. * * * *

"In the instant case it was not possible to as-

sess damages as of the date of the institution of bankruptcy proceedings. Then whether or not any obligation would eventuate against bankrupts was subject to an unmatured contingency, namely, whether the maker of the collateral notes would default after maturity. Even this contingency, under the Negotiable Instruments Law ripening liability of the bankrupt indorsers, was dependent, at the time of default and dishonor, and not earlier, upon the formality of notice. Bankruptcy, under the circumstances here, could not work an anticipatory breach of the indorsement contract to the result that a provable debt became established as of the date when proceedings were instituted.

"Aside from cases cited, the doctrine of Moch vs. Market Street National bank, *supra*, is disregarded in the First Circuit (In re Swift, 112 F. 315, 321); in the Second Circuit (In re Roth & Appel, 181 F. 667, 31 L. R. A. (N. S.) 270); in the Fifth Circuit (Atkins vs. Wilcox, 105 F. 595, 598, 53 L. R. A. 118); and in the Eighth Circuit (Watson vs. Merrill, 136 F. 359, 69 L. R. A. 719, Bank vs. Stuppi (C. C. A.), 2 F. (2) 822, and Britton vs. Western Iowa Co. (C. C. A.), 9 F (2) 488, 45 A. L. R. (711). Without referring to either case, this court, in Wells vs. Twenty-First Street Co. (C. C. A.), 12 F. (2) 237, applied the principle of In re Roth and Appel, *supra*, rather than that of Moch vs. Market Street National Bank, *supra*.

"Our conclusion, from the foregoing review of the authorities, is that debts which are provable in bankruptcy within any of the categories of section 63a must be such as are subject to liquidation as of the date of the filing of the petition and which then exist as a fixed liability absolutely owing, whether or not then due and payable. The collateral obligations of the bankrupts, attempted to be proven in this case, do not meet these imperative conditions."

An interesting note on the Elliott case, apparently

inclining to our position, is found in 12 Minn. Law Review 60.

This case has since been cited with approval In re Adair Realty & Trust Co. (D. C. Ga.) 35 F. (2) 531. In the Adair case, the question was as to the provability of certain guaranties which had not become absolute at the date of bankruptcy. It was held they were not provable.

On re-examination of the question by the Sixth Circuit the same conclusion was reached in the instant case.

In Bibb Manufacturing Co. vs. Pope (D. C.-N. Y.) 22 F. (2) 557, Judge Augustus Hand writing, the court held that a guarantee of a bankrupt of monthly installments of indebtedness of a third party was not the basis of a favorable claim because contingent. Merrill vs. Baker, 186 Fed. 313 was a similar case. In re Inman, 171 Fed. 185, the same reasoning prevailed. This was a claim for services after bankruptcy. A claim for rent under similar circumstances will be refused.

D.

Petitioners' Authorities.

In pages fifteen *et seq.* of petitioner's brief reference is made to certain authorities. We concede that Moch vs. Market Street National Bank (107 F. 897)—Third Circuit; In re P. Semner Glass Co. (135 F. 77)—Second Circuit, are contra to our contention.

Colman vs. Withoft, 195 F. 250—(Ninth Circuit) is not, in our opinion, contra.

> "But the claim of appellant in this case, although it had its origin in the obligation of the bankrupt

to pay rent which accrued after the filing of the petition, is not, as it is presented, a claim for rent; but it is one that arises out of the contract of two lessees, jointly liable for rent, whereby one thereof, the bankrupt, agreed to reimburse the other for all the payments which it might make in excess of one-half of the rental, and to pay it one-half of such sum as it might be required to pay in gross, not to exceed $100 per month for the unexpired term, to obtain a rescission of the lease. Is such a claim provable against the estate?

"It is held by the decided weight of authority that subdivision 1 and 4 of section 63a of the Bankruptcy Act are in pari materia, and that the words 'absolutely owing at the time of the filing of the petition against him' are to be read into subdivision 4. In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; In re Swift, 112 Fed. 315, 50 C. C. A. 264; In re Adams (D. C.) 130 Fed. 381; In re Burka (D. C.) 104 Fed. 326. It is apparent that the appellant's claim was not a debt due and owing at the time when the petition was filed, but that it was contingent; that is to say, all the facts necessary to be shown to establish the bankrupt's liability to the claimant had not occurred before the petition in bankruptcy was filed.

"'Where a liability of the bankrupt is not fixed, so that it can be liquidated by legal proceedings instituted at the time of bankruptcy, it is not a debt. It is deemed so far contingent that it cannot be proved in bankruuptcy, nor is it released by the bankrupt's discharge. A sum of money payable upon a contingency is not provable because it does not become a debt until the contingency has happened.' Loveland on Bankruptcy (3d Ed.) 342.

"In Dunbar vs. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, it was said:

"'We do not think that by the use of the lan-

guage in section 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove.'

"At the time when the petition was filed, not only was the bankrupt not indebted to the appellant, but it could not then be known that he ever would be indebted to it, either for money to be paid for rent or for money to be paid for the rescission of the lease. As far as the rent was concerned, there were the contingencies that the lessee might cancel the lease, or that the trustee in bankruptcy might elect to pay the rent, or that the appellant might fail to pay more than its half thereof. As to the agreement looking to a rescission of the lease, there were the contingencies that the agreement, which was without consideration, might be revoked by either party thereto before it was acted upon, or that it might be impossible to secure rescission on the terms stipulated by the bankrupt."

The quotation on page 17 of petitioner's brief misconceives the situation. Judge Gilbert treats the paper as *made* by the bankrupt. Of course, it cites the Moch case and is obiter. The reasoning quoted above supports us.

Cobb vs. Overman, 109 Fed. 65, Fourth Circuit, is not in point. In that case the obligation, a bond to pay periodic installments during life of beneficiary was a fixed liability, absolutely owing, though not due.

Therefore, there are only two circuits opposed to our position.

Under Point D, Petitioner's Brief, page 21, it is stated that this court has three times written opinions indicative of a tendency to hold contra to our position. They seem to us inapplicable. Riggin vs. Magwire, 82 U. S. 549, was under the Act of 1841; Martin vs.

Cole, 104 U. S. 30, says a negotiable instrument evidences an express contract. We agree. It is nevertheless contingent.

Dunbar vs. Dunbar, 190 U. S. 340, cited for petitioners, we claim as an authority for our position. That was a suit for the enforcement of an agreement to pay alimony "during widowhood." It was held not discharged by bankruptcy. Justice Peckham said:

> "We do not think that by the use of the language in section 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove."

II.

PROVABILITY OF CLAIMS BASED ON BANKRUPTS' ENDORSEMENT OF NEGOTIABLE INSTRUMENTS MATURING MORE THAN ONE YEAR AFTER ADJUDICATION.

Under the first subdivision of our argument we have considered the provability of all the claims. In addition to what has been said, certain of the notes were not provable because they did not fall due for more than one year after adjudication. This maturity, alone, could possibly make them provable and, as proof was then barred by the statute of limitation they could not be enforced.

John B. Varney claim $3,000.00, due October 3, 1926.

Smith & Scott, 2 notes, $2,400.00 each, due October 3, 1926 and 1927, respectively.

Bankruptcy Act, Section 57-n, reads "Claims shall not be proved against a bankrupt estate, subsequent to

one year after the adjudication." See Loveland, Sec. 301, where he states this rule. Even the Smith case, 146 Fed. 923, at 926, strong against us as to provability, admits the endorsed paper must fall due within a year.

> "It is true that to wait for the happening of a contingency may result in some delay in the distribution of dividends but the period within which proof can be made is limited by statute to one year and the great bulk of trade paper is short time paper."

The Moch case limits the time to a year. That rule runs all through the cases. Remington, Bankruptcy, 3rd Ed. Sec. 777; Jas. Dunlap Carpet Co., 163 Fed. 541. In re Schechter, 39 Fed. (2) 18.

We therefore submit this additional reason for the non-provability of these notes.

III.

LACHES.

A.

General.

All of the claimants plead that there has been such laches on the part of the Trustee in not filing petition for re-examination and to expunge until July 25, 1927, that he is now barred from any favorable decision disallowing and expunging these claims.

In each petition the Trustee has set up the circumstance which led him to delay the filing of these petitions to re-examine and expunge. In all of these cases, briefly, the reason alleged is that in another claim in the same bankruptcies, the Referee and the District

Court ruled that the contingent liability of an endorser upon an instrument not due at the date of the filing of the petition in bankruptcy was a provable claim in bankruptcy. The Trustee took prompt appeals from the ruling of the Referee and the ruling of the District Court in these matters in the case of Elliott vs. First National Bank. It was not until May, 1927, that the Circuit Court of Appeals sustained the Trustee's position upon this rule of law, and that order did not become final until June 13, 1927. On July 25th, these petitions to re-examine and expunge, based on that opinion, were filed. The question is whether this delay on the part of the Trustee was such laches as now make it inequitable to permit a re-examination of these questions.

It will help in determining this point to briefly refer to the general rules as to what is or is not laches. This will be found discussed in Pomeroy 4th Ed., Sec. 1440, *et seq.* In Section 1442, Professor Pomeroy states an accurate and concise definition drawn from Chase vs. Chase, 20 R. I. 202, 37 Atl. 804:

> "Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within the limits allowed by law, but when knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he can not be restored to his former state if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, or other cause, and when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."

This statement is supported by a host of authorities there cited.

We do not contend that in the absence of a statute of limitation applicable to equity cases, that equity necessarily applies the legal statute of limitation. We do say that

> "Under ordinary circumstances, a suit in equity will not be stayed for laches before, but will be stayed after, the time fixed by an analogous statute of limitation at law, but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of the suit after the briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. * * * * When a suit is brought within the time fixed by an analogous statute, the burden is upon the defendant to show, either from the face of the bill, or by his answer, that extraordinary circumstances existed which required the application of the doctrine of laches; but when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case." Pomeroy, Section 1441.

In the present case, as we will hereafter show, there is a statute of limitation which is applicable; that statute of limitation is not applicable to a legal cause of action, but is in the Bankruptcy Act itself, and the Trustee, in filing these petitions, is wholly within his rights, although the length of time mentioned above has elapsed since the filing of the claims in bankruptcy.

B.

Laches Regardless of Bankruptcy Law.

Taking up first, consideration of the case of the Trustee, regardless of the Bankruptcy Act, and considering it purely as an equitable question of laches, our contention is that there can be no laches, because of the time of filing the petitions for re-examination, because of the fact that there has been no change of position, and no disadvantage to the claimant from this delay. This is necessarily true when we consider that all the claimant has done is file his claim upon the note; that claim has been allowed; there is no contention that because of that allowance the claimant has been prejudiced.

Petitioners contend they were misled to their disadvantage in two particulars: (a) Because assuming that notes due within one year only are provable, and then only after steps under the Negotiable Instrument Law to fix liability, as explained in subdivision two, they cannot now make amended proof of their claims, as the year had expired, when reconsideration was sought. Petitioners' Brief, pages 27-30 and 31. The notes affected would be the following:

Ronan note, $3,000.00, due October 3, 1925.
One Smith & Scott note, $2,400.00, due October 3, 1925.
Rutherford note, $15,000.00, due September 25, 1925.

The rule barring claims after one year does not apply to amendments to existing claims, setting up new or additional grounds. Remington (Third Edition), Section 888, *et seq.* Therefore, if the court should hold

such claims provable, proper amendment may be made. (b) Because of failure to protest certain notes allegedly based on the allowance of the claims without exception.

Two of the notes, one Varney, one Smith and Scott, were not protested by the claimants. The Maynard note and the Smith and Scott note, both falling due October 3, 1925, and after the order allowing the claims against both estates on August 18, 1925, were both duly and regularly protested and notice given. These claimants did not rely on the order of allowance. They apparently understood the law better than counsel for the Trustee and protected their interest fully. Before the notes, which were not protested fell due, the referee had on January 26, 1926, and the District Judge had, on May 26, 1926, overruled the petition of the Trustee against the First National Bank, in these same proceedings, which claimed non-provability under Section 63-a, on the ground that the endorsements in that case were not obligations of the bankrupt, at the time of the filing of the petitions in bankruptcy. It would not be a violent presumption that this action of these two judges was as much the cause of the failure to protest the October 3, 1926, notes as the inaction of the Trustee. Particularly is this to be assumed when the same claimants and the same counsel protested the notes of October 3, and September 25, 1925, even though no proceedings to re-examine were then pending.

On October 3, 1926, it had never been held that the endorsement of a bankrupt on a note unmatured at bankruptcy was not provable, if it fell due within the year. It had been stated obiter by text writers and courts that such notes were non-provable, if they fell due after the year. Subdivision 2 hereof. Judge Cochran in his manuscript opinion in the First National case had refused allowance where there had been

no protest, even within the year, though he held the claims otherwise provable. Therefore, the failure to protest the 1926 notes would have required the expunction of the claims, under any conceivable holding as to provability, unless it is to be determined that every endorsement of a bankrupt, regardless of the time of maturity of the note upon which it is placed is to be regarded as a provable debt, protest or no protest, notice or no notice.

There was certainly no reason why protest should not have been made under Sections 81 and 113 of the Negotiable Instrument Law on determination of the Referee contra to petitioners. Those sections read—

SECTION 81. WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.

"Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

SECTION 113. DELAY IN GIVING NOTICE—HOW EXCUSED.

"Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence."

Furthermore, it is a well-recognized rule that where a suit is pending concerning the same subject matter, but between other parties, it is not laches for the plain-

tiff in the case in which laches is pleaded, to await the outcome of that litigation before involving himself and the person pleading laches, in further legal controversy over a subject of dispute which will be finally determined in the already pending litigation. Mr. Pomeroy recognizes this rule in Section 1455. It was so held in U. S. Mittis Co. vs. Detroit Steel Spring Co., 122 Fed. 863, which case was cited with approval in Schey vs. Tury, Circuit Court of Appeals of Second Circuit, 294 Fed. 679. This rule was also announced in Jersey City vs. Central R. Co., 212 Fed. 76, and was further recognized in the case of a stockholder in a corporation who waited until a short time before litigation involving the same relief, but by other stockholders of the same corporation, was finally adjudicated, before filing suit, and it was held that the stockholder was entitled to await the result of that litigation before starting independent litigation upon his own part. Jackson Co. vs. Gardiner Investment Co., 200 Fed. 113.

The same rule prevails where litigants are defeated in one suit, for lack of jurisdiction, and bring another later on, in the proper court. Southern Pacific Co. vs. Bogart, 250 U. S. 483.

We, therefore, submit that there is no laches in this case, first, because there has been no change of position to the disadvantage of the claimant pleading laches; and, second, because the Trustee had a right to await the outcome of the litigation of the First National Bank before filing these further petitions to re-examine claims on an identical proposition of law. This latter contention is all the more true in a case of bankruptcy, because there all of the parties claimant were parties to that suit, and must be presumed to have known the contentions that were being made, and the litigation that was going on, which held up the distribution of

the property, and the sale of the assets, awaiting the determination of the courts in that litigation.

C.

Laches Under Bankruptcy Act.

And there are even more cogent reasons than the above for holding that there is no laches in this particular case. Section 57-k of the Bankruptcy Act provides as follows:

> "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

That this also applies to cases where a dividend has been paid is made clear by Section 57-l of the Bankruptcy Act, which reads as follows:

> "Whenever a claim shall have been reconsidered and rejected in whole or in part, upon which a dividend has been paid, the Trustee may recover from the creditor the amount of the dividend received upon the claim, if rejected in whole, or the proportional part thereof, if rejected only in part."

General Orders in Bankruptcy, No. 21, Sec. 6, also has some bearing upon the matter under consideration. It reads as follows:

> "When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred, for an order for such re-examination, and thereupon the referee

shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor, etc."

It is our contention that these provisions of the Bankruptcy Act definitely fix the limits within which a petition for re-examination may be filed; that these are statutes applicable to suits in equity, and to these bankruptcy claims, and that, therefore, the Trustee was well within his rights in awaiting the determination of the other suits before beginning the five actions here in question upon similar issues of law.

Our conclusions are supported by the authorities. In In re Star Spring Bed Co., 265 Fed. 137, it was held that there was no laches in moving to expunge after four and one-half months.

In In re Globe Laundry Co., 198 Fed. 365, there was objection because of the delay of the trustee in moving to expunge. This was considered, and basing their conclusion on the sections of the Act above cited, the court held that it was perfectly proper for the Trustee to bring this suit. This case was cited in 254 Fed. 745, hereafter referred to.

When the point was made that the Trustee had been guilty of laches, it was held in the case of In re Canton Iron & Steel Co., 197 Fed. 767, that the "attack was in time, the estate not yet closed."

In re Huffman & Co., 15 Fed. (2) 345, it was held that a proceeding for reconsideration of a Referee's order was authorized at any time during the pendency of the estate.

As a final authority, we cite In re Caledonia Coal Company, 254 Fed. 742. In that case, a voluntary petition was filed in May, 1916. In July, 1917, the trustee filed a petition asking that certain claims be re-examined and expunged. Judge Tuttle said:

"It is further urged that the trustee has been guilty of such laches in filing his petition as to bar his right to do so. Delay alone does not constitute laches, the essential element being prejudice to another person, by reason of the delay complained of. It does not appear that the delay in this case has resulted in any injury or prejudice to the claimant which would now make it inequitable to allow the trustee to file his objections to these claims. Section 57-k of the Bankruptcy Act provides that 'claims which have been allowed may be reconsidered for cause and reallowed or rejected, in whole or in part, according to the equities of the case, before, but not after, the estate has been closed.'

"Under the circumstances, it can not be held that the trustee has been guilty of laches."

In the light of the statutory provisions of the Bankruptcy Act above quoted, and of the language of the authorities construing these provisions as to laches, we submit that the Trustee has not been guilty of laches within the definition of the authorities; that he has providently saved the litigants from the expense of determining questions which have been determined in this same proceeding adversely to them, and that he has kept not only within the strict letter of the statute as to the time when his petition to re-examine should be filed, but has kept within the spirit of those laws, in this method of handling his cases.

IV.

EFFECT OF FORMER PETITION TO RE-EXAMINE

A separate issue arises in the Rutherford claim. On August 18, 1925, the petitioner, A. G. Rutherford, filed

a claim against the estate of the bankrupt, Nancy Jane Varney, based on two notes, one for $38,000.00, signed by the bankrupt, and one for $15,000.00, the one here in issue, signed by a third party and endorsed by the bankrupt, Nancy Jane Varney, Record, p. 21. A petition for re-examination was thereafter filed by the Trustee directed solely against the $38,000.00 note. The petition was sustained and the claim, so far as it was predicated on the $38,000.00 note expunged. A petition for review of the Referee's order was allowed to the District Court, where the Referee's order was affirmed and, on appeal to the Sixth Circuit, the judgment of the District Court was affirmed.

No dividend has been paid on the note in question from the estate of this bankrupt.

On July 25, 1927, and after the determination on the former petition to re-examine and expunge, a petition to re-examine and expunge the claim on the $15,000.00 note was filed. This is the petition now in issue.

Apparently this is an issue of first impression. We can not cite an applicable decision. The propriety of our action is based upon the following reasoning:

The appellee, Rutherford, filed an answer, B, Record, p. 24, setting up the facts above stated and claiming that it would be inequitable to now permit a re-examination of that part of the claim based on the $15,000.00 now in question. It is apparently a plea of *res adjudicata*. It is to be observed that the record says nothing, either in the statement of the grounds of the petition or in the answer, as to the issues in the former petition for the re-examination of the claim based on the $38,000.00 note. There is therefore nothing to show that the question here in issue was decided in the former litigation. This is a burden which rested on the appellee. The record in fact shows that the same issue

could not have been adjudicated. The $38,000.00 note was signed by the bankrupt, Record, p. 21. This $15,000.00 note was endorsed by her. The issue is as to the provability of the endorsement of an unmatured note. Therefore, this issue could not have been in question on the former petition.

A re-examination is allowed under Clause Six of General Order 21 and k of Bankruptcy Act 57, both of which are quoted in the Brief of Argument, pages 8 and 9. The procedure is governed by General Order 21. It will be noted that the proper procedure is by petition for re-examination. This is the first step. That petition, by familiar principles must state the grounds of the Trustee's cause of action against the claimant. In this proceeding a valid ground for expunction of the $38,000.00 claim was stated, which resulted in its being expunged. Was the former proceeding an adjudication of the present issue which bars this proceeding?

The decree in the former proceeding was upon a cause of action which stated the invalidity of the claim of $38,000.00 upon a note signed by the bankrupt. The decree sought in this proceeding is upon the validity or invalidity of an entirely separate note endorsed by the bankrupt for $15,000.00. Not only is the cause of action distinct but the grounds for the decree will be based on an utterly different issue. This renders the plea of *res adjudicata* ineffectual.

> "The effect of a judgment or decree as *res adjudicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar. * * * * But if the second case be upon a different cause of action, the prior judg-

ment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered." Baltimore S. S. Co. vs. Phillips, 274 U. S. 316.

In Cromwell vs. County of Sac, 94 U. S. 351, it was early held that a suit on bonds and coupons was not *res adjudicata* on matters not actually litigated in the former suit, by reason of a decree determining fraud in the issuance of the bonds.

In Adams vs. Adams, 25 Minn. 72, there was a suit to recover on one of a series of notes. The defendant pleaded illegality of consideration. The plaintiff replied with a plea of *res adjudicata* on a default judgment on a former note of the series. Held that as consideration need not be alleged, it was not determined by the former suit and there was no estoppel.

In Independent Harvester Co. vs. Tinsman, 253 Fed. 935, the Harvester Company brought a bill to cancel a series of notes for fraud. A judgment was obtained by defendant in a different court on one. The fraud was not pleaded as a defense in this proceeding. The court held that fraud was not *res adjudicata* in the cancellation suit because it was a different cause of action.

In Jacobson vs. Miller, 41 Mich. 90, an opinion by Judge Cooley, it was held that a former suit for an installment of rent, determined in plaintiff's favor, did not support a plea of *res judicata* to a defense of *non est factum*, where this defense was not made in the former suit, because the present suit was on a different cause of action.

In this estate a claimant filed his deposition to establish his right to a part of the funds administered upon two notes. This gave rise to two distinct causes of action in the Trustee, one flowing from each note. Each

cause of action was the primary right in the trustee to question the validity of each note as a claim against the estate. It was no more necessary for him to file a petition to expunge both notes at the same time than it was for him to file, at one time, and in the same petition, exceptions to all claims filed in the estate. We therefore submit that the plea of *res judicata* is unavailing against this petition for re-examination of the Rutherford claim.

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Sixth Circuit should be affirmed in each case.

STANLEY REED,
Counsel for Respondents.

BROWNING & REED,
Ashland, Kentucky,
STRATTON & STEPHENSON,
Pikeville, Kentucky,
Of Counsel.